

Written Response by the Welsh Government to the report of the Legislation, Justice and Constitution Committee entitled ‘The Welsh Government’s Legislative Consent Memorandum on the Strikes (Minimum Service Levels) Bill’

Thank you for the Legislation, Justice and Constitution Committee’s report on the Welsh Government’s Legislative Consent Memorandum on the Strikes (Minimum Service Levels) Bill (the “Bill”).

I welcome the conclusion reached by the majority of the Committee that clauses 1 to 3 of the Bill and paragraphs 1 and 2 of Part 1 of the Schedule to the Bill require the consent of the Senedd. This is consistent with the position set out in the Legislative Consent Memorandum. I note the Committee’s agreement with the Welsh Government that the Senedd’s consent is not required for paragraphs 3 to 10 in Part 2 to the Schedule.

I further note the view of the majority of the Committee that clauses 4 to 6 of the Bill require the Senedd’s consent. The Welsh Government’s position is that these provisions do not require consent as they have no substantive legal effect.

I have set out my response to the Report’s recommendation below.

Recommendation 1

The Committee recommends that:

The Counsel General, should in advance of the debate on the relevant legislative consent motion, clarify what steps the Welsh Government has taken to resolve the difference of opinion between it and the UK Government, including through the intergovernmental dispute resolution procedures, and consequently, what further action, if any, the Welsh Government intends to take.

Response: Accept

I have taken a number of steps to explain our devolution concerns in respect of this Bill and the powers it affords UK Ministers to interfere in public services which are fully devolved. Most recently, this has included an exchange of letters with the lead UK Minister for the Bill. Copies of these letters are provided to the Committee.

In addition, I have used intergovernmental relations machinery to raise the Bill and our devolution concerns at Interministerial Standing Committee. The position of the UK Government remains unchanged and I am concerned that the Sewel convention is too often ignored. I have raised these concerns with members of the House of Lords who are scrutinising the Bill.

Financial Implications: None

Engagement with the UK Government and use of intergovernmental relations mechanisms are standard activities undertaken from existing budgets.

Attachment

Exchange of letters between the Counsel General and Minister Hollinrake:



Letter from Counsel Minister Hollinrake
General to Minister Hollinrake letter to CGMC 17.0:

Mick Antoniw AS/MS

Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution



Ein cyf/Our ref: CG/PO/74/2023

Kevin Hollinrake MP
Parliamentary Under Secretary of State
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Minister.Hollinrake@beis.gov.uk

07 March 2023

Dear Kevin,

I am writing further to the First Minister's letter dated 16 January on the UK Government's Strikes (Minimum Services Levels) Bill.

We strongly oppose this Bill in Wales and note the significant opposition to it which extends beyond the Welsh Government, opposition parties and trades union. We are following the legislative scrutiny of the Bill and recognise the concerns raised by many peers during the Bill's 2nd reading in the House of Lords, including by eminent crossbenchers like Baron Judge, a former Lord Chief Justice for England and Wales. We hope the Bill will be defeated in the Lords and believe firmly that Ministers should not seek to take powers that impede the path to positive resolutions by making the right to withdraw labour illusory.

The draft Bill has already drawn criticism from the ILO and other nations and the Welsh Government deprecates in the strongest terms the attempt that is being made to impose deeply undemocratic provisions on services which are devolved to Wales. These services are overseen on the basis of mandates provided by the people of Wales and not the whim of a UK Secretary of State who is not answerable to that electorate on devolved matters. The Bill as drafted undermines the integrity of democratic devolution and should not bring devolved public services into scope.

There is no evidence the Bill will help resolve current disputes, but there is every indication it will do lasting damage to industrial relations across the UK and will interfere with devolved public services in Wales. We do not agree with your analysis that the UK Government is legislating solely within its reserved competence for employment rights and duties and industrial relations. The Bill clearly contains clauses that make provision with regard to the devolved matters of health, education, fire and rescue services and some transport matters.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

The Bill also contains sweeping Henry VIII powers which allow consequential amendment to be made to legislation that concerns devolved matters. The power to make regulations enables amendment, repeal or revocation to an Act or Measure of Senedd Cymru. These matters are not merely incidental to the Bill and require the consent of the Senedd. To that end, we have laid a Legislative Consent Memorandum (LCM) in the Senedd. I am confident when the LCM is debated and voted upon in the coming weeks, we will see a clear demonstration of the Senedd's lack of consent for the Bill and its provisions with regard to devolved matters.

In many ways, your own consultation documents acknowledge the Bill makes provisions with regard to services which are fully devolved. For example, your consultation in respect of ambulance services says they are “run differently in England, Scotland and Wales and are the responsibility of the Scottish and Welsh Governments respectively” and that there are “implications of those differences for setting minimum service levels”. There is similar commentary in your consultation documents in respect of fire and rescue services and rail services. Across all these services, there are significant strategic and operational differences in Wales, and it is an affront to devolution that UK Ministers should exercise powers that will impact on these areas, without an electoral mandate or the consent of the Senedd.

The lack of detail in the Bill makes it difficult to set out with any precision the potential impact the Bill could have on services in Wales, but taking rail as an example, it's clear the options which are being looked at could see a disproportionately negative impact on some routes and areas. It's not hard to see how rail routes that are busier and viewed as more business critical will be prioritised at the expense of others, particularly those deemed to be in more peripheral parts of the UK.

As regards fire and rescue services, defining a “minimum service level” would need a full and detailed knowledge of local risks of fire and other incidents, including locations and facilities (like oil refineries, tall residential buildings and ports) which present higher or unusual risks; and of the current disposition and availability of crews, appliances and specialist assets available to respond to them. These factors vary considerably from one area to another, and indeed over time as many fire risks are seasonal. There would be particular problems in Wales given that most of the country is sparsely populated and served only by on-call firefighters who could not practically be subjected to a work notice, as they are not obliged to work in any event. It would be impossible to generalise about all of these factors at a GB-wide or indeed Wales-wide level, or to reduce it to a simple percentage of firefighting staff. Any Secretary of State who purported to make such a decision would be assuming considerable risks, including risks to life, as any such decision would be necessarily ill-informed and not reflective of local needs and capabilities.

We are not prepared to see these decisions play out in rail, in ambulance services and in fire and rescue – decisions which will ultimately be taken by a UK Minister divorced from the conditions and negotiations in Wales. Across all of the relevant services which are wholly – or partially devolved – the terms and conditions negotiated by Welsh public bodies are interwoven with the strategic and operational plans for the delivery of services which derive from programmes for government, developed on the basis of democratic devolved elections.

We are concerned that in practice, this Bill allows UK Ministers to take unpredictable decisions with far reaching consequences that could jeopardise negotiations. Any regulation that is made by a Secretary of State that interferes with industrial disputes within devolved public services could prolong action that would otherwise be resolved as a result of Wales level negotiations. The Bill only requires the Secretary of State to “consult such persons as

the Secretary of State considers appropriate” and does not stipulate any framework whatsoever to ensure that consultations are carried out with sufficient time and with the involvement of responsible parties such as employers and trades unions. Similarly, no route or role is provided for Welsh Ministers, even where they are responsible for the service in question rather than the Secretary of State.

The Welsh Government cannot take comfort from informal assurances offered by UK Ministers who may pledge to not make regulations that interfere with devolved public services. The UK Government made similar commitments in relation to the use of financial assistance powers during the passage of the UK Internal Market Bill. However, these powers are now being used on a systematic basis to allocate spending in relation to the levelling up agenda and which leaves Welsh communities and businesses severely worse off.

Given the views of the Welsh and Scottish Government’s on this Bill, I urge you to think again and to remove devolved public services from the scope of this Bill. It cannot be right that a UK Minister should be empowered to make regulations which will impact on the operations of devolved services, and which will have a deleterious impact on the partnership relationships we have, and which employers and trade unions have freely entered into.

Our strong and constructive relationships with employers and trade unions are based on good faith, mutual respect and trust, and they are essential to how we use our devolved responsibilities to run devolved services differently and in the collective interests of the people of Wales.

I am copying this letter to the Secretary of State for Wales, the Welsh Affairs Committee in the House of Commons, and the Legislation Justice and Constitution Committee in the Senedd.

Yours sincerely,



Mick Antoniw AS/MS

Y Cwnsler Cyffredinol a Gweinidog y Cyfansoddiad
Counsel General and Minister for the Constitution



Department for Business & Trade

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17 March 2023

Dear Mick,

Thank you for your letter dated 7 March 2023 regarding the Strikes (Minimum Service Levels) Bill. I will address the points you have raised, but I would like to begin by highlighting that this Government firmly believes that the ability to strike is an important part of industrial relations in the UK, rightly protected by law.

However, industrial action is disruptive for everybody – for members of the public who rely on essential services to get to work or care for their family; for the NHS trying to get the backlog down or schools trying to recover lost learning after the pandemic; for local businesses whose sales and productivity suffer – and for striking workers themselves, who forfeit pay at a time when the costs of living are rising. We need to have confidence that essential services are available to people who work hard and expect the services they pay for to be there when they need them.

The public rightly expect the Government to act in circumstances where their rights and freedoms are being disproportionately impacted. This legislation therefore seeks to balance the ability to strike against the rights and freedoms of others to access vital services during strike action, to protect the lives and livelihoods of the public.

Henry VIII power

In your letter you refer to the Henry VIII power. This power may only be used to make amendments to other legislation that are genuinely consequential on this Bill. It is a standard power, using standard wording. The Bill already includes a number of changes to the Trade Union and Labour Relations (Consolidation) Act 1992 as a consequence of this Bill - but it is possible not all necessary consequential amendments to other legislation have been identified in the Bill's preparation, particularly in relation to other primary legislation that is still going through Parliament in this session. It is therefore prudent for the Bill to contain a power to deal with these in secondary legislation and the Government considers it is appropriate to include this power, so that full effect can be given to the Bill. If this power is used to amend primary legislation then the regulations would be subject to the affirmative procedure, so would need to be approved by both Houses of Parliament before being made. This power may be used to amend provisions that are made by or under primary legislation

that is passed either before this Bill is passed, or later, if in the same session of Parliament as this Bill.

Devolution and consultation

I note that you have published a Legislative Consent Memorandum. We do not agree that the legislative consent process is engaged for this Bill. The purpose and substance of the Bill is to regulate employment rights and duties and industrial relations. This is a reserved matter. Whilst the services to which minimum service levels may apply include areas regarded as devolved areas, the purpose and substance of the Bill is to regulate employment rights and duties and industrial relations in those areas, and not the area itself.

As you are aware, the Bill enables minimum service levels to be implemented via regulations, following consultation. We have already published our consultations for ambulance, fire and rail services which are available to access on Gov.co.uk and I know that my colleagues have already reached out to ministers in your administration to speak about this. We encourage everyone who may be interested in or potentially affected by minimum service levels to contribute to the consultations to ensure they are able to participate in the process of setting the minimum service level which may apply. I strongly encourage you and your government to engage with the consultations to ensure your views are shared. We appreciate that these services can be complex and that is why we are seeking information through the consultations to help inform our policy decisions.

Once regulations for minimum service levels are in force for a specified service, if the trade union gives notice of strike action, the employer may issue a work notice ahead of the strike, specifying the workforce required to achieve the minimum service level for that strike period. Under the Bill the employer is not under a statutory duty to issue a work notice. However, we would hope that all employers will want to apply minimum service levels where they are needed.

Finally, I would like to end by reiterating that this Government is confident that our new Minimum Service Legislation is compatible with our international obligations including the European Convention on Human Rights. Minimum service levels are not new, indeed many major European countries have some version of minimum service levels for their key public services.

I hope the above addresses your concerns and clarifies what this Bill is seeking to achieve.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kevin', written in a cursive style.

KEVIN HOLLINRAKE MP

Parliamentary Under Secretary of State – Department for Business and Trade